

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

BREE McCLESKEY

*

V.

* Civil Action No. 1:20-CV-00166

TOLTECA ENTERPRISES INC.,
DBA PHOENIX RECOVERY GROUP
& TRAVELERS CASUALTY AND SURETY
CO. OF AMERICA

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Defendant TRAVELER'S CASUALTY & SURETY CO. OF AMERICA, ("Traveler's")
files this Original Answer to Plaintiff's Complaint.

1. Travelers enters a general denial.
2. Travelers denies any and all allegations that it has any vicarious liability as it is merely the bond company without any direct involvement in the matters Plaintiff alleges in her Complaint.
3. Travelers denies any and all allegations of collective action and joint enterprise as it is merely the bond company without any direct involvement in the matters Plaintiff alleges in her Complaint.

II. Affirmative Defenses and Pleas in Avoidance

4. Travelers is informed and believes, and thereon alleges, that in the event one or more of the Defendants are held liable to Plaintiff, which liability is denied and contested, then the liability of Travelers would be passive, derivative, or secondary, while other Defendants and/or third parties would be actively or primarily liable for Plaintiffs' alleged injuries and damages. Travelers would show that it had no involvement in any of the claims and causes of action Plaintiff has brought in this lawsuit against any party. Travelers did not direct, encourage, solicit,

or participate in any way in the events, acts, or omissions giving rise to Plaintiff's allegations or in the underlying lease and debt account transaction.

5. Travelers is informed and believes, and thereon alleges, that the Plaintiff is not within the the class of persons protected under the bond Travelers has on file for Tolteca Enterprises Inc.

6. Travelers is informed and believes, and thereon alleges, that Plaintiff is barred from recovery as requisite conditions of the bond, contract, and statutes pursuant to which the bond was written were not met.

7. Travelers is informed and believes, and thereon alleges, that the items claimed by the Plaintiff are not payable pursuant to the terms and conditions of the bond.

8. Travelers is informed and believes, and thereon alleges, that any liability on the bond in this lawsuit is limited to the penal sum set forth on the bond, and should valid claims on the bond exceed the penal sum, such claims may only be satisfied on a pro rata basis up to the penal sum of the bond.

9. Travelers is informed and believes, and thereon alleges, that it is entitled to assert any and all defenses and pleas of its principal, Tolteca Enterprises Inc., under any surety bond that may be applicable. Travelers hereby incorporates by reference any and all defenses and pleas to Plaintiff's lawsuit that could be asserted by Tolteca Enterprises Inc.

10. Travelers is informed and believes, and alleges, Travelers is entitled to indemnification and/or contribution in whole or in part from all persons or Defendants whose conduct, acts, omissions, or fault proximately contributed to Plaintiff's damages, or who may otherwise be liable for such damages, if any.

11. Travelers may have additional, and as yet unstated defenses. Travelers reserves all

rights under the law to assert additional affirmative defenses as they become known during the course of the litigation.

12. Travelers further asserts that it is merely a surety company for its principal, Tolteca Enterprises Inc., and Travelers has no liability for any cause of action Plaintiff has asserted in this lawsuit and there is no basis in fact or law for Travelers to be held liable in this lawsuit. Travelers is not a party to any contract, lease, conduct, acts, omissions, or activity involving or concerning the Plaintiff. Travelers would show it has no liability herein unless there is full and strict compliance with all of its terms and conditions of the bond and conditions precedent thereto, and not unless Plaintiff obtains a final, non-appealable, unsatisfied judgment against Travelers' principal, Tolteca Enterprises Inc. Accordingly, Travelers would show that Plaintiff has no standing to assert any claims against Travelers; that Travelers has been misjoined into this lawsuit; that there is no justiciable and ripe claim against Travelers; that there is no case or controversy between Travelers and the Plaintiff, and for such reasons there is a lack of jurisdiction concerning Travelers. Travelers should be dismissed from this lawsuit.

WHEREFORE, Travelers asks the court to dismiss this case with prejudice and/or render a take nothing judgment against the Plaintiff and that Plaintiff be assessed all costs and fees. Travelers prays for such other and further relief as may be just.

S/TOM CLARKE

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Attorney for Travelers

CERTIFICATE OF SERVICE

This document has been e-filed with the court's CM/ECF electronic filing system on December 9, 2020, which will give electronic notice to Plaintiff's attorney, Brent Devere.

S/Tom Clarke